UNITED
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AT

Administrative Tribunal

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19 November 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 632

Case No. 686: MUGHIR

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Ioan Voicu;

Whereas at the request of Randa Mughir, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 15 September 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 19 August 1992, the Applicant filed an application requesting the Tribunal, inter alia:

"to find that:

(a) Applicant had not been afforded 'every reasonable consideration' for a career or indefinite appointment, and had, therefore, been denied fair treatment and due process;

(b) Applicant's post was fictitiously discontinued ... in order to provide a rationale for her termination;

(c) The decision to abolish the Applicant's post and to terminate her was, therefore, tainted by improper motives;

(d) Applicant was unfairly deprived of consideration for the payment of an SPA [special post allowance] ...;

(e) The delay in and the nature of the Administration's reaction to the Discrimination Panel's reports amounted to unfair treatment of the Applicant;

(f) Therefore, the indemnity recommended by the JAB [Joint Appeals Board] in para.7 31(d) of its report ... is grossly insufficient;

(g) That the Secretary-General failed to honour his solemn commitment ..., to implement all unanimous JAB recommendations, provided that they do not impinge on any major question of law of principle.

And consequently to order that:

(a) Applicant be reinstated as from 1 January 1991, with full retroactive payment of salary and allowances;

(b) In the event that the Secretary-General chooses not to reinstate her, and in view of this case's exceptional circumstances: Applicant be paid the monetary equivalent of three years' net salary plus the termination indemnity to which she would have been entitled had she held an indefinite appointment; and Applicant be given a recommendation enabling her to compete in the job market;

(c) Applicant be paid a sum corresponding to an SPA from G-6 (Washington) to P-2 for the period from the date of resignation of the Professional Officer-in-Charge of the Unit (...) until the day of the Applicant's reinstatement;

(d) Applicant be paid an indemnity double the amount recommended by the JAB ($30,000.00 instead of $15,000.00) for the injury suffered as a result of the Administration's failure to deal promptly and adequately with the Discrimination Panel's reports."

Whereas the Respondent filed his answer on 18 December 1992;

Whereas the Applicant filed written observations on 22 February 1993;

Whereas, on 9 and 21 October 1993, the Applicant submitted an additional document;

Whereas, on 28 October 1993, the Tribunal put questions to the Respondent and on 2 November 1993, he provided answers thereto;

Whereas, on 4 and 11 November 1993, the Applicant submitted his comments on the Respondent's answers to the questions put by the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 22 September 1975. From 1975 to 1977, she served on different short-term appointments at the G-3 level, as Assistant Conference Officer, with the Department of Conference Services. On 15 December 1980, she was recruited on a three-month fixed-term appointment at the G-3 level, as an Editorial Clerk in the Development Forum (later - Development Business) Unit of the Department of Public Information (DPI), in Washington, D.C. The Applicant continued to work in this Unit, serving on a series of fixed-term appointments of varying length, until her separation from the United Nations on 31 December 1990.

On 27 June 1984, the Applicant wrote to the Assistant Secretary-General for Personnel Services, complaining, inter alia, about her lack of promotion in spite of the recommendations by her supervisor and about the absence of a job description, indicating her duties. She also expressed her concern about the possibility of the abolishment of her post. She sought advice "on procedures for recourse action and redress of grievances for a staff member in my unique position."

In a reply dated 31 July 1984, the Applicant was informed by a Personnel officer that she would be promoted to the G-4 level and that DPI was preparing her job description. In addition, he confirmed "regarding the proposed abolition of [her] post" that DPI intended "to redeploy [her] post from Washington to NY" and she would be "given the choice of relocating to New York in order to continue with [her] employment". If she did not agree, her fixed-term appointment would not be extended. The Applicant was promoted to the G-4 level, as Senior Editorial Clerk, with effect from 1 April 1984. However, the job description was not prepared, nor does the file indicate that she was asked to transfer to New York.

On 22 October 1984, the Applicant again wrote to the Assistant Secretary-General for Personnel Services to complain about the "abuse of authority" by her direct supervisor, the Associate Information Officer, a P-2 staff member in charge of the Unit, and the absence of a job description.

On 25 July 1986, the Applicant filed a complaint with the Panel on Discrimination and Other Grievances (the Panel on Discrimination) complaining of abuse and harassment by her supervisor, absence of a job description and of her general contractual situation.

On 13 November 1987, the Applicant was retroactively promoted to the G-5 level, with effect from 1 April 1985 and to the G-6 level, with effect from 1 April 1986, on conversion to the new classification standards approved by the General Assembly, upon the recommendation of the International Civil Service Commission. Her functional title was changed to Editorial Assistant.

On 30 November 1987, the Associate Information Officer who had been in charge of the Unit and who was the Applicant's supervisor, separated from the UN, and was not replaced. The Applicant became the senior officer of the Unit and her functional title was changed to "Officer-in-Charge", with effect from 14 June 1989.

On 14 August 1990, the Applicant again wrote to the Panel on Discrimination reiterating the contents of her earlier memorandum of 25 July 1986.

On 31 October 1990, the Co-ordinator of the Panel on Discrimination, wrote to the Assistant Secretary-General, Office of Human Resources and Management[1], conveying, inter alia, the Panel's opinion that the Applicant was kept on short-term extensions of fixed-term appointments "unnecessarily and unfairly as a means of punishment for complaining about her status." It therefore, recommended that the Applicant "be granted an immediate indefinite appointment in Washington".

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[1] Successor of the Office for Personnel Services

On 25 October 1990, the Director, Information Products Division, DPI, wrote to the Editor-in-Chief, Development Forum, DPI, informing him that, given the severity of the financial situation of the Development Forum Trust Fund it had been decided, inter alia, to eliminate two posts in the liaison office in Washington, the P-2 previously encumbered the Applicant's supervisor and the G-6 post encumbered by the Applicant.

On 5 November 1990, the Executive Officer, DPI, informed the Applicant as follows:

> "I am ... writing to advise you that the post you are currently encumbering under the present staffing table has been designated as a post to be discontinued. Although no prior notice is required under the terms of your appointment and Staff Rule 109.7(a), I regret to inform you that the Department of Public Information is not in a position to extend your fixed-term appointment beyond 31 December 1990.
>
> You will note that the functions of the remaining lower level General Service post in Washington will be revised and, as a consequence, this post will be advertised. Should you be interested in applying and being considered for it along with other candidates, you may do so, subject to your confirmation in writing of your willingness to accept a lower grade than your present personal grade".

The Applicant did not apply for the above post and separated from service on 31 December 1990.

On 30 April 1991, the Applicant requested administrative review of the decision to abolish her post. Having received no reply, on 9 July 1991 and 21 August 1991, respectively, the Applicant lodged an appeal to the Joint Appeals Board (JAB). The Board adopted its report on 31 March 1992. Its conclusions and recommendations read, in part, as follows:

"Conclusions and recommendations

30. ...

(a) Appellant had not been afforded "every reasonable consideration" for a career or indefinite appointment, and had, therefore, been denied fair treatment and due process;

(b) Appellant's post was fictitiously discontinued, not - as alleged by Respondent - for financial reasons, but in order to provide a rationale for her termination;

(c) Appellant was unfairly deprived of consideration for the payment of an SPA;

(d) the delay in and the nature of the Administration's reaction to the Grievance Panel's Report amounted to unfair treatment of the Appellant."

Recommendations

"31. ...

(a) Appellant be reinstated as from 1 January 1991, with full retroactive payment of salary and allowances;

(b) in the event that the Secretary-General chooses not to reinstate her, Appellant be paid the monetary equivalent of two years' net salary plus the termination indemnity to which she would have been entitled had she held an indefinite appointment;

(c) Appellant be paid a sum corresponding to an SPA from G-6 (Washington) to P-2 for the period from the date of resignation of [the Associate Information Officer] until the termination date of Appellant's appointment; and

(d) Appellant be paid an indemnity for the injury suffered as a result of the Administration's failure to deal promptly and adequately with the Grievance Panel's reports. ... The Panel recommends that Appellant be paid the sum of $5,000.00 if she is reinstated and $15,000.00 if she is not.

32. The Panel makes no further recommendation with respect to this appeal."

On 8 July 1992, the Assistant Secretary-General for Human Resources Management transmitted to the Applicant copy of the JAB report and informed her that the Secretary-General, after considering the report, had decided:

> "... to reaffirm that the reorganization of offices within the Secretariat is within his discretionary authority. He is satisfied that the decision to pare down the staffing of the Development Forum Unit, in Washington and New York, was justified by the critical financial situation of that Unit, which was required to be self-supporting. This situation has deteriorated since 1990.
>
> Bearing in mind that:
>
> (i) the precarious financial situation of the Development Forum/Development Business publications made it impossible to view your functions as being of a continuing nature, a prerequisite for consideration of any staff member for career appointment;
>
> (ii) in accordance with staff rule 104.12(c), no indefinite appointment can be offered unless the Secretary-General has identified a particular agency or office for that purpose, and that the office where you served was not so designated,
>
> the Secretary-General cannot accept the Board's recommendations that you be reinstated as of 1 January 1991, or be paid two years' net salary plus the termination indemnity to which you would have been entitled had you held an indefinite appointment.
>
> However, given the procedural and other shortcomings noted in your case, and the lack of clarity in the process which lead to what amounted to a termination of appointment for abolition of post, the Secretary-General has decided that your case should be treated as a termination of your fixed-term appointment. You will therefore be paid a termination indemnity in accordance with staff regulations 9.3(a) and Annex III to the Staff Regulations.

> The Secretary-General has noted that you were not considered for a special post allowance, which would have allowed for a proper assessment of the level of your functions between 1 December 1987 and your separation on 31 December 1990, and for a determination as to whether the criteria for a special post allowance were met. For that reason, the Secretary-General has decided to accept the Board's recommendation that you be paid a special post allowance from G-6 (Washington) to P-2 from 1 December 1987 until 31 December 1990.
>
> The Secretary-General has taken note of the Board's comments concerning the handling of the repeated communications from the Panel on Discrimination and Other Grievances. He regrets that the corrective measures agreed to in 1989 by the Department were either not carried out or were implemented with a considerable delay and, on that basis, has decided that you should receive a sum of $5,000 in compensation for the damage you suffered as a result. The Secretary-General also notes that the subsequent recommendations of the Panel were overtaken by events since you were separated from service after your post was abolished and you then availed yourself of the appeals process which provided the proper forum to consider your case. It is after taking into account all the circumstances of the case and the evidence before him, that the Secretary-General has taken the decisions set out above, which will compensate for any unfairness you may have suffered."

On 19 August 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was denied fair treatment and due process because she had not been afforded "every reasonable consideration for an indefinite appointment".

2. The Applicant's post was "fictitiously" discontinued not for financial reasons but to provide a rationale for her termination.

3. The decision to abolish the post was, therefore, tainted by improper motives.

Whereas the Respondent's principal contentions are:

1. The decision to abolish the Applicant's post was dictated by financial concerns. The Applicant was accorded the benefits of the Staff Regulations and Rules applicable to reduction in staff.

2. The Applicant received appropriate consideration for further appointments, given the precarious financial situation of Development Forum.

3. The Respondent sufficiently compensated the Applicant for any unfairness she may have suffered.

The Tribunal, having deliberated from 27 October to 19 November 1993, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary-General dated 8 July 1992, not to accept the JAB's recommendations that she should be reinstated as of 1 January 1991 and be paid two years'net salary plus the termination indemnity to which the Applicant would have been entitled had she held an indefinite appointment. Although the Secretary-General acknowledged procedural and other shortcomings in the Applicant's case and the lack of clarity in the process which led to what amounted to a termination of her appointment for abolition of post, he concluded that her case should be treated as a termination of her fixed-term appointment and that she should be paid a termination indemnity in accordance with staff regulation 9.3(a) and annex III to the Staff Regulations.

The Secretary-General accepted the JAB's recommendation that the Applicant be paid a special post allowance from the G-6 (Washington) to the P-2 level, from 1 December 1987 until 31 December 1990. He also decided that the Applicant should receive the sum of $5,000, as compensation for the damage she suffered as a result of the fact that the corrective measures agreed to in 1989 by the Administration were either not carried out or were implemented with a considerable delay.

II. The Applicant claims that she was denied fair treatment and due process because she had not been afforded every reasonable consideration for an indefinite appointment. She claims that her post was "fictitiously" discontinued, not for financial reasons, but to provide a rationale for her termination and that the decision to abolish the post was, therefore, tainted by improper motives.

III. In this regard, the Tribunal recalls that while termination of a staff member is the exercise of a discretionary power vested in the Secretary-General, it must not, however, be exercised in an arbitrary or capricious manner. In Judgement No. 347, Sabatier (1985), para. II, quoting from an earlier Judgement No. 54, Mauch (1954), the Tribunal stated as follows:

> "5. It should be noted that staff regulation 9.1(c) does not require the Secretary-General to state a specific reason or follow any particular procedure for termination of temporary-indefinite appointments. It is sufficient that the termination be found by him to be in the interest of the United Nations. While the measure of power here was intended to be left completely within the discretion of the Secretary-General, this would not authorize an arbitrary or capricious exercise of the power of termination, nor the assignment of specious or untruthful reasons for the action taken, such as would connote a lack of good faith or due consideration for the rights of the staff member involved."

IV. In the present case, the Tribunal finds that the reasons for the abolition of the Applicant's post were not fictitious but real. The cause was the continued deterioration of the critical financial position of Development Forum, which necessitated the adoption of emergency measures, including abolition of posts. In the light of the evidence produced, the Tribunal concludes that the abolition of the Applicant's post and the termination of her appointment were carried out in conformity with staff rule 109.1(c). The Tribunal notes that it was suggested to the Applicant that she apply for the remaining post in her unit, which at the time, was at a lower grade.

The Applicant chose not to do so. The Secretary-General treated her case as a termination of her fixed-term appointment and she was paid the appropriate indemnity. The decision of the Secretary-General was a valid exercise of his discretionary power and was not tainted by improper motives.

V. With respect to the Applicant's claim that she was denied fair treatment and due process because she had never been considered for a career appointment, as required by General Assembly resolution 37/126, when she completed five years of satisfactory service at the end of 1985, the Tribunal notes the JAB's conclusion that had the Applicant not been unfairly treated, she might well have been the holder of an indefinite appointment at the time DPI decided to discontinue her post, with the advantages and additional procedural safeguards of such staff.

However, the Tribunal notes that the administrative instruction ST/AI/274 invoked by the Applicant to demonstrate that she had a right to a career appointment, is applicable only to staff at Headquarters. It is not applicable to her, as she was recruited to serve outside Headquarters. Moreover, the precarious financial situation of Development Forum made it impossible for the Administration to view the Applicant's functions as being of a continuing nature to a degree warranting a career appointment under General Assembly resolution 37/126.

VI. The Applicant claims compensation for the injury suffered as a result of the Respondent's failure to deal promptly and adequately with the Panel on Discrimination's report. The Tribunal observes that the Respondent took no action in response to the Panel on Discrimination's memoranda of 14 June 1989, 31 October 1990, 26 November 1990 and 11 April 1991, until after the Applicant had been separated and had filed a request for administrative review. The two communications which were finally prepared (dated 10 June 1991 and 27 August 1991) were not seen or commented upon by the Applicant. On the basis of these communications, the Respondent

decided not to accept the recommendations of the Panel on Discrimination. In view of this delay and the denial to the Applicant of an opportunity to comment on the communications, the Tribunal finds a substantial basis for the JAB's finding that the Respondent's reaction to the requests of the Panel on Discrimination was "totally unacceptable, but also totally consistent with the cavalier manner with which [the Applicant] has been treated through most of her career."

VII. Similarly, the Tribunal notes with dismay and regret that the Applicant had to wait seven years to have her post classified and that the official job description for the post was never shown to her.

VIII. While the Tribunal is aware that the Respondent decided to pay the Applicant US$5,000 in compensation for the injury to her as a result of his handling of communications from the Panel on Discrimination, the Tribunal finds that such compensation is insufficient, given the nature and severity of the injury. In the light of all the facts and circumstances of the case, the Tribunal decides that an award of additional compensation to the Applicant is called for.

IX. The Applicant has complained about the withholding by the Respondent of a recommendation that would have enabled her to compete in the job market. As this issue was not considered by the JAB, it is not properly before the Tribunal.

X. As to the Applicant's requests made in the written observations dated 22 February 1993, for the payment of costs incurred in connection with the preparation of her case, the Tribunal declines to make any award, in keeping with its jurisprudence in Judgement No. 237, Powell (1979).

XI. For the foregoing reasons, the Tribunal orders that:

The Respondent pay US$5,000.00 to the Applicant, as additional compensation for the unfair treatment she suffered.

XII. All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Ioan VOICU
Member

New York, 19 November 1993

(R) Maria VICIEN-MILBURN
Executive Secretary